

UNITED STATES DEPARTMENT OF COMMERCE  
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION  
WASHINGTON, D.C. 20230

In the Matters of:

Matthew James Freitas, et al.

Anthony Black, et al.

Respondents

Docket Number:

PI0904338

PI0904340

**ORDER ON PETITIONS FOR INTERLOCUTORY REVIEW**

This order considers a request for interlocutory review filed by the Respondents in the above captioned cases. In two separate administrative enforcement actions initiated by NOAA, Respondents were charged with violating the Western and Central Pacific Fisheries Convention Implementation Act (WCPFCIA)<sup>1</sup> and implementing regulations. These regulations in part prohibited setting purse seine gear around a Fish Aggregating Device (FAD) during certain times of the year.

As part of their defense, Respondents challenge NOAA's ability to prosecute alleged violations that occurred within 30 days of the date the final rule establishing the prohibition was published in the Federal Register. Respondents argue that the Administrative Procedure Act (APA) generally requires a 30-day delay before a substantive rule can become effective, and that NOAA improperly waived this requirement. For the reasons set forth below, I have determined that NOAA waived the 30-day delayed effective date for good cause, consistent with the requirements of the APA. Given this determination, NOAA may prosecute alleged violations that occurred within 30 days of the date the final rule was published.

**FACTUAL BACKGROUND**

Through the WCPFCIA, the United States implements its responsibilities under the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean.<sup>2</sup> Among these responsibilities, the United States implements conservation and management measures adopted by the Commission for the Conservation and

<sup>1</sup> 16 U.S.C. §§ 6901 – 6910.

<sup>2</sup> *Id.*

**Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (Commission).<sup>3</sup>**

In December 2008, the Commission adopted Conservation and Management Measure (CMM) 2008-1, entitled "Conservation and Management Measure for Bigeye and Yellowfin Tuna in the Western and Central Pacific Ocean." The goal of CMM 2008-1 was to reduce fishing pressure on Bigeye and Yellowfin Tuna.<sup>4</sup> CMM 2008-1 sought to achieve this goal in part by prohibiting purse seine fishing around FADs between August 1 and September 30, for the years 2009-2011.

On June 1, 2009, the National Marine Fisheries Service (NMFS) published a proposed rule to implement CMM 2008-1.<sup>5</sup> That same day, the NMFS Regional Administrator for the Pacific Islands sent a letter to known purse seine vessel owners including Respondents, enclosing a copy of the proposed rule and providing a detailed explanation of the proposed prohibition.<sup>6</sup> The letter also provided notice that in order to make the final rule effective by August 1, 2009, NMFS might need to waive the 30-day delayed effectiveness provision of the APA. Specifically:

*In order for the United States to satisfy its obligations under the convention, the proposed FAD prohibition period and associated observer requirement must be made effective by August 1, 2009. Depending upon when the final rule is issued, NMFS may need to consider shortening or waiving the 30-day delayed effectiveness provision of the Administrative Procedures Act (APA) so that the FAD prohibition period and associated observer requirement are implemented on schedule....If NMFS finds good cause to shorten or waive the 30-day delayed effectiveness period for the 2009 FAD prohibition period and associated observer requirement in order to comply with the international obligations of the United States under the Convention, those elements of the proposed rule could become effective as early as the date of publication of the final rule, which would follow NMFS' consideration of public comments on the proposed rule.<sup>7</sup>*

On August 4, 2009, NMFS published a final rule implementing CMM 2008-1.<sup>8</sup> The final rule was made effective on August 3, 2009, the date of filing with the Federal Register. Within the rule, NMFS stated that there was good cause to waive the 30-day delay in the effective date. Specifically, NMFS determined that a 30-day delay:

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<sup>3</sup> 16 U.S.C. § 6904.

<sup>4</sup> Conservation and Management Measure 2008-1.

<sup>5</sup> 74 Fed. Reg. 26,160 (June 1, 2009).

<sup>6</sup> Administrative Record (Record) F-6 and F-7; *In the Matter of Andrew James Freitas*, NOAA Docket No. PI0904338 (Agency's Opposition to Respondents' Motion to Dismiss for Failure to State a Claim, Exhibit 1); *In the Matter of Anthony Black*, NOAA Docket No. PI0904340 (Agency's Opposition to Respondents' Motion to Dismiss for Failure to State a Claim, Exhibit 1).

<sup>7</sup> *Id.*

<sup>8</sup> 74 Fed. Reg. 38,544 (Aug. 4, 2009).

*would be impracticable and contrary to the public interest the [sic] FAD prohibition period and associated observer requirement would be in effect for only about half the specified period in 2009, meaning that NMFS would be frustrated in promulgating the regulations to satisfy the international obligations of the United States under the Convention. Also, NMFS had limited notice of the need to implement CMM 2008-1, which was adopted in the December 2008 regular annual session of the WCPFC.*<sup>9</sup>

Respondents are commercial fishers subject to United States jurisdiction. In a Notice of Violation and Assessment (NOVA), NOAA alleged that on the following dates in August 2009, the F/V American Triumph fished on FADs in violation of the rule: August 15, 17, 18, 22, 24, 28 and 31.<sup>10</sup> In a separate NOVA, NOAA alleged that on August 14, 2009, the F/V Sea Quest fished on FADs in violation of the rule.<sup>11 12</sup>

Respondents in both cases requested an administrative hearing. Respondents challenge in part the Agency's authority to prosecute violations that occurred within 30 days of the effective date of the final rule. They argue that the Agency violated the APA by making the rule effective immediately, instead of 30 days after its publication. There is no disagreement that the Agency, in the final rule itself, made the rule's requirements effective immediately. Rather, Respondents challenge the justification for making the rule effective immediately, arguing that "good cause" did not exist.

On December 9, 2011, the Administrative Law Judge certified Respondents' applications for interlocutory review on this issue.<sup>13</sup> The issue was accepted for review by the Administrator on April 16, 2012.<sup>14</sup> At the Administrator's request, the Agency submitted the administrative record for the final rule. The matter is now ripe for decision.

## LEGAL FRAMEWORK

Section 553(d) of the APA requires a 30 day delay before a substantive rule can become effective.<sup>15</sup> Under the statute:

<sup>9</sup> 74 Fed Reg. 38,544, 38,552 (Aug. 4, 2009).

<sup>10</sup> *In the Matter of Anthony Black*, NOAA Docket No. PI-0904340 (Notice of Violation and Assessment).

<sup>11</sup> *In the Matter of Andrew James Freitas*, Docket No. PI-0904338 (Notice of Violation and Assessment).

<sup>12</sup> Respondents in each case also are alleged to have committed similar violations on dates that are more than 30 days beyond the effective date of the rule. These violations are beyond the scope of this order.

<sup>13</sup> *In the Matter of Andrew James Freitas*, NOAA Docket No. PI0904338 (Order Granting Respondents' Application for Interlocutory Review); *In the Matter of Anthony Black*, NOAA Docket No. PI0904340 (Order Granting Respondents' Application for Discretionary Review).

<sup>14</sup> *In the Matter of Andrew James Freitas*, NOAA Docket No. PI0904338 (Order Accepting Interlocutory Review and Requesting Production of the Administrative Record); *In the Matter of Anthony Black*, NOAA Docket No. PI0904340 (Order Accepting Interlocutory Review and Requesting Production of the Administrative Record).

<sup>15</sup> 5 U.S.C. § 553(d)(3).

*The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except – (1) a substantive rule which grants or recognizes an exemption or relieves a restriction; (2) interpretive rules and statements of policy; or (3) as otherwise provided by the agency for good cause found and published with the rule.*

The delay in the effective date is intended to give affected parties time to adjust their behavior before the rule takes effect. The logic for doing so is two-fold. First, a window of time usually causes no harm. Second, until a final rule is published, the public typically does not know what the rule will require or when it will actually be promulgated.<sup>16</sup>

As the statute makes clear, however, this 30-day period may be waived by a federal agency for "good cause found and published in the rule." As explained in the House Report on the APA:

*Many rules...may be made operative in less than 30 days because of inescapable or unavoidable limitations of time, because of the demonstrable urgency of the conditions they are designed to correct, and because the parties subject to them may during the usually protracted hearing and decision procedures anticipate the regulations.<sup>17</sup>*

## ANALYSIS

I conclude that NMFS acted appropriately by invoking the good cause exemption and making the final rule effective immediately. NMFS was required to have regulations in force by August 1, 2009, in order to give effect to CMM 2008-1. Failure to meet this firm deadline would have resulted in serious harm. It would have compromised necessary conservation efforts intended to reduce fishing pressure on Bigeye and Yellowfin tuna. Moreover, the United States would have failed in its obligations under the Treaty to timely implement a conservation and management measure of the Commission.

The need to waive the 30-day period was not due a failure by NMFS to timely develop its rule. I have carefully reviewed the administrative record associated with the regulations. Based on this review, I disagree with Respondents' claim that NMFS was untimely in its actions, only beginning this rulemaking on June 1, 2009. Rather, the record shows that NMFS actually began work on the rule in January 2009.<sup>18</sup> Once work began, NMFS diligently proceeded to develop the rule, together with all required environmental and regulatory analyses.<sup>19</sup> Despite best efforts,

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<sup>16</sup> *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479 (9th Cir. 1992).

<sup>17</sup> S. Doc. No. 248, 79th Cong., 2d Sess. 260 (1946), cited in, *U.S. Steel Corp. v. EPA*, 605 F.2d 283, 290 (7th Cir. 1979).

<sup>18</sup> Record at A3 and A4.

<sup>19</sup> According to the administrative record, NMFS began implementing the WCPFC's Bigeye and Yellowfin conservation measures on or about January 14, 2009. (Record at A3 and A4). On or about February 18, 2009, NMFS began to internally circulate an outline for its NEPA compliance documents, purpose and need statement, and alternatives for its Environmental Assessment. (Record at B13). On March 20, 2009, NMFS issued its Federal

NMFS was unable to publish a final rule until August 3, 2009. Unless NMFS waived the 30-day delay and made the rule effective immediately, nearly 50% of the intended benefit of the rule for 2009 would have been lost.

Even though the final rule was effective immediately, Respondents had ample notice of the new requirements and the date they likely would become effective, allowing them to adjust their fishing operations to meet these new requirements. Along with publishing the proposed rule on June 1, 2009, the NMFS Regional Administrator sent a letter to U.S. purse seine vessel owners, including the owners of Respondents' vessels. This letter advised them of the proposed rule, alerted them to the need to impose these requirements by August 1, 2009, and warned them of the possibility that NMFS might need to waive the 30-day delay in effectiveness in order to meet this deadline. In all respects relevant to the violations at issue, the requirements in the final rule were the same as those contained in the proposed rule.<sup>20</sup>

### CONCLUSION

I find that NMFS had good cause to make the final rule effective immediately. NMFS was confronted with a firm deadline for having regulations in place. Failure to meet this deadline would have caused real harm by failing to timely impose an important conservation measure and meet international treaty obligations. The need to make the final rule effective immediately was not the result of agency delay in rule making. Indeed, the record shows that the NMFS used best efforts to promulgate a final rule as quickly as possible. Moreover, Respondents were given advance notice of the requirements and when they would become effective, allowing them ample time to come into compliance with the new requirements.


For these reasons, I find that waiver of the 30 day delayed effective date for the final rule was for good cause and in compliance with the APA. Given this determination, NOAA may prosecute alleged violations that occurred within 30 days of the date the final rule was published.

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consistency determination to the State of Hawaii and relevant Territories. (Record at C31-C34). On April 8, 2009, NMFS provided notice to the Western Pacific Fisheries Management Council of its plans for implementing the CMM 2008-001 purse seine measures. (Record at D-20). On April 29, 2009, memos indicating compliance with the Marine Mammal Protection Act and Endangered Species Act were completed and inserted into the record. (Record at D-61 and D-62). NOAA's Regulatory Impact Review was completed and signed on May 1, 2009. (Record at E-2). The Essential Fish Habitat consultation was completed on May 4, 2009. (Record at E-4). On May 5, 2009 the draft proposed rule was cleared by the NOAA Regional Administrator for the Pacific Island Region. (Record at E-11). NOAA General Counsel cleared the proposed rule on May 12, 2009 (Record at E-27) and Department of Commerce General Counsel provided clearance on May 26, 2009. (Record at E-26). On June 1, 2009, the Draft Environmental Assessment (EA) was released to the public along with the publication of the proposed rule. (Record at F-9 and F-10).

<sup>20</sup> The final rule included a technical change that was made in response to comments received from the American Tunaboat Association (of which Respondents are members). NMFS clarified that the vessel engaged in fishing does not constitute a FAD. 74 Fed. Reg. 38,544, 38,552 (Comment 5). This change lessened the restrictions set forth in the proposed rule. Otherwise the prohibition against fishing on FADs was the same in both the proposed and final rule.

Nov. 15, 2012  
Dated

  
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Jane Lubchenco, Ph.D.  
Under Secretary of Commerce  
for Oceans and Atmosphere



### **CERTIFICATE OF SERVICE**

I hereby certify that on November 16, 2012, I served by third party commercial carrier, UPS, the attached Order on Petitions for Interlocutory Review (Docket Nos. PI0904338 and PI0904340) upon the following parties (or their designated representatives) in this proceedings as follows:

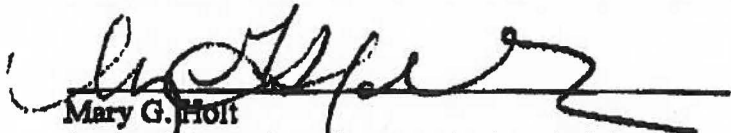
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16 Nov 2012  
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